Supreme Court, U.S.
FILED
JUN - 6 2016

No. 15-423

IN THE

Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. THE BELL ISSUE DOES NOT MERIT REVIEW 2

A. The Government's Assertion Of A Circuit Conflict Is Mistaken 2

B. The D.C. Circuit's Approach Does Not Conflict With This Court's Precedent 6

II. THE GOVERNMENT IS CORRECT THAT THE OTHER QUESTIONS PRESENTED DO NOT WARRANT REVIEW 9

A. H&P-V's Claim Does Not Merit Review 9

B. H&P-IDC's Claim Does Not Warrant Review 11

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Page(s)

Abelesz v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) 5

Agudas Chasidei Chabad v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) 2, 3, 4, 5, 8

Arbaugh v. *Y&H Corp.*, 546 U.S. 500 (2006) 8

Banco Nacional de Cuba v. *Farr*, 383 F.2d 166 (2d Cir. 1967) 9

Banco Nacional de Cuba v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962) 9

Bell v. *Hood*, 327 U.S. 678 (1946) 2

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 7

Cassirer v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) 5

City of New York v. *Permanent Mission of India to the United Nations*, 618 F.3d 172 (2d Cir. 2010) 7

de Sanchez v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985) 5

FG Hemisphere Associates v. *Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Mezerhane v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015) 5

Permanent Mission of India to the United Nations v. *City of New York*, 551 U.S. 193 (2007) 6, 7

Phoenix Consulting v. *Republic of Angola*, 216 F.3d 36 (D.C. Cir. 2000) 2, 3

Robinson v. *Government of Malaysia*, 269 F.3d 133 (2d Cir. 2001) 4, 6

Siderman de Blake v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) 5

Simon v. *Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) 2, 3, 5, 7

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 7, 8

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 8

West v. *Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987) 5

Zappia Middle East Construction v. *Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000) 3

TABLE OF AUTHORITIES—Continued

Page(s)

DOCKETED CASES

Permanent Mission of India to the United Nations v. *City of New York*, No. 06-134 (U.S.) 7

STATUTES AND RULES

28 U.S.C. §1605 ..... 3, 4, 7

Vz. Commercial Code, art. 280(4) 11

Fed. R. Civ. P. 12 6

OTHER AUTHORITIES

Fletcher Cyclopedia of the Law of Corporations (2013 rev. ed.) 11

Restatement (Second) of Foreign Relations Law (1965) 10

Restatement (Third) of Foreign Relations Law (1987) 8, 10

INTRODUCTION

Respondents filed this action nearly five years ago to seek redress for petitioners' uncompensated taking of their entire Venezuelan drilling business, worth hundreds of millions of dollars. Respondents assert jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"), which abrogates foreign sovereign immunity "in any case ... in which rights in property taken in violation of international law are in issue" and where a nexus with the United States exists. Petitioners advanced several defenses to jurisdiction, many of which remain unresolved. Opp. 29-30.

The government agrees with respondents that the primary international-law questions presented in the petition implicate no division among the circuits and do not warrant review. The government nonetheless recommends that the Court further delay this case—still at the threshold after five years—solely to address the standard of review that Judge Tatel, joined by Chief Judge Garland, applied in analyzing those issues. But the government's recommendation is based on a clear misunderstanding of the court of appeals' approach. The D.C. Circuit applies that standard only in a narrow set of cases. When properly understood, the court's approach does not conflict with any decision of this Court or the other circuits and in no way warrants this Court's review. The Court should decline the government's suggestion and allow respondents' claims to go forward.

I. THE *BELL* ISSUE DOES NOT MERIT REVIEW

A. The Government's Assertion Of A Circuit Conflict Is Mistaken

Under *Bell* v. *Hood*, 327 U.S. 678, 682 (1946), subject-matter jurisdiction "is not defeated" by the possibility that a claim might fail on the merits. Because merits issues "must be decided after and not before the court has assumed jurisdiction over the controversy," a court should not dismiss an action for lack of jurisdiction based on the merits unless the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where [the] claim is wholly insubstantial and frivolous." *Id.* at 682-683.

The D.C. Circuit applies *Bell* in a narrow category of FSIA cases: those in which both (1) the defendant argues on legal grounds that the plaintiff has not asserted the type of claim to which the expropriation exception applies, and (2) the jurisdictional inquiry fully overlaps with the merits determination. *Simon* v. *Republic of Hungary*, 812 F.3d 127, 140 (D.C. Cir. 2016); *Agudas Chasidei Chabad* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008). As the government acknowledges, the D.C. Circuit does not apply *Bell* "[w]hen the foreign state challenges the factual basis for jurisdiction"; in that circumstance, courts must "go beyond the pleadings and resolve disputed issues of fact necessary to determine jurisdiction." U.S. Br. 8 n.2; *see Phoenix Consulting* v. *Republic of Angola*, 216 F.3d 36, 40-41 (D.C. Cir. 2000); *Agudas*, 528 F.3d at 940 (where "jurisdiction depends on particular factual propositions (at least those independent of the merits), the plaintiff must, on a challenge by the defendant, present ade-

quate supporting evidence").[1] Similarly, as the government acknowledges, the D.C. Circuit "will not apply" *Bell* where "'the jurisdictional and merits inquiries do not overlap'" and the concerns animating *Bell* do not arise. U.S. Br. 12 n.5; *see Simon*, 812 F.3d at 140-141.

The government contends (at 13-15) that the D.C. Circuit's application of *Bell* conflicts with other courts' approach to evaluating jurisdiction under the expropriation exception. That assertion is incorrect. None of the decisions the government cites presents circumstances in which the D.C. Circuit applies *Bell*, none would be analyzed differently in the D.C. Circuit, and none considered whether *Bell* should apply in a case like this one.

In *Zappia Middle East Construction* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 251-252 (2d Cir. 2000), the plaintiff sought to establish a taking in violation of international law by alleging an alter-ego relationship between two private entities and the sovereign defendant. The defendants challenged the factual basis of the alter-ego theory, and after two years of jurisdictional discovery, the district court dismissed the suit for "fail[ure] to establish facts sufficient to bring the action within the purview of the expropriation exception." *Id.* at 249. The D.C. Circuit would have taken the same approach without applying *Bell*. *See Phoenix Consulting*, 216 F.3d at 40-41; *Agudas*, 528 F.3d at 940.

---

[1] Here, for example, petitioners dispute whether the expropriated property "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. §1605(a)(3). That challenge will be resolved based on the available evidence after "carefully controlled and limited" jurisdictional discovery, without reference to *Bell*. *Phoenix Consulting*, 216 F.3d at 40; *see Agudas*, 528 F.3d at 940.

Similarly, in *Robinson* v. *Government of Malaysia*, 269 F.3d 133, 145 (2d Cir. 2001), the defendant argued that the plaintiff had not "pleaded or c[o]me forward with evidence sufficient to show" that his claim fell within the FSIA's non-discretionary torts exception, 28 U.S.C. §1605(a)(5)—an exception that did not fully overlap with the merits of the claims, 269 F.3d at 140-141. The Second Circuit invoked the standard for "resolv[ing] a factual dispute" and in doing so relied heavily on the D.C. Circuit's decision in *Phoenix Consulting*. *Id.* at 140-141. The D.C. Circuit in turn has cited *Robinson* and other Second Circuit decisions with approval in discussing the standard governing factual challenges to FSIA jurisdiction. *FG Hemisphere Assocs.* v. *Democratic Republic of Congo*, 447 F.3d 835, 843 (D.C. Cir. 2006); *Agudas*, 528 F.3d at 940.

The government cites (at 14) language in *Robinson* indicating that the Second Circuit would follow *Phoenix Consulting* to evaluate factual challenges to jurisdiction even when that inquiry overlaps with the merits. *Robinson*, 269 F.3d at 141-143; *see id.* at 148 (Sotomayor, J., concurring in the judgment) (criticizing that suggestion). That language also poses no conflict, because the D.C. Circuit has expressly reserved the question of what standard applies "when jurisdiction depends on factual propositions intertwined with the merits of the claim." *Agudas*, 528 F.3d at 940. Moreover, that question is not presented here because petitioners stipulated that the jurisdictional issues addressed in the decision below would be litigated based on the complaint's undisputed allegations. Pet. App. 9a, 47a-48a.

The remaining decisions cited by the government also would not have been analyzed differently in the D.C. Circuit, and none addresses *Bell*'s applicability in

the present circumstances. In *de Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), the plaintiff's tort and contract claims did not overlap with the expropriation exception's requirements. The Fifth Circuit's analysis of international law, on which the government relies (at 14), thus did not implicate the concerns underlying *Bell*, and the court did not consider whether *Bell* might apply. *Id.* at 1395-1397. Under *Simon*, 812 F.3d at 140, the D.C. Circuit also would not have applied *Bell*. Likewise, in *Mezerhane* v. *Republica Bolivariana de Venezuela*, 785 F.3d 545, 547 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016), the plaintiff asserted "common law tort claims" that did not fully overlap with the jurisdictional question. And in *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), the plaintiff failed even to plead an element (exhaustion of domestic remedies) that the Seventh Circuit deemed necessary to establish a violation of international law, *see id.* at 679-685—an issue that also would not be subject to *Bell* in the D.C. Circuit. *See Agudas*, 528 F.3d 940 (*Bell* applies where "jurisdiction depends on the plaintiff's asserting a particular type of claim, *and it has made such a claim*" (emphasis added)).

Unlike the cases cited by the government, the only other circuit that has considered what standard applies when a defendant argues on legal grounds that the plaintiff has not placed in issue rights in property taken in violation of international law holds that *Bell* applies. *West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987); *see also Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992).

Because the court of appeals' decision creates no circuit conflict, the government's speculation (at 15)

that the decision might undermine the uniformity of FSIA law or "encourage forum-shopping" is baseless. Moreover, by ignoring the differences between the narrow category of cases in which the D.C. Circuit applies *Bell* and other cases in which it does not, the government vastly overstates (at 16) the supposed consequences of the decision below. Indeed, since the D.C. Circuit first addressed *Bell* in the FSIA context in *Agudas*, it has applied it in only one reported decision: this one.

The rarity of FSIA decisions applying *Bell* is not surprising. "Litigants more commonly arrive at the result produced by [a merits-related] Fed. R. Civ. P. 12(b)(1) motion for lack of subject matter jurisdiction by moving early for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted." *Robinson*, 269 F.3d at 149 n.1 (Sotomayor, J., concurring in the judgment). The issue arose here only because petitioners did not initially challenge the legal sufficiency of respondents' expropriation claims under Rule 12(b)(6) and stipulated to litigate certain legal questions before jurisdictional discovery. This Court should not delay this case further to address an issue that affects such a narrow class of cases and as to which there is no circuit conflict.

B. The D.C. Circuit's Approach Does Not Conflict With This Court's Precedent

Even if mere error in the decision below could justify this Court's review, there is no error here. The government's contrary contention (at 7-13) relies principally on *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007). But the decision below does not conflict with *Permanent Mission* or any other decision of this Court.

In *Permanent Mission*, the City of New York sought a declaration that tax liens it held against properties owned by foreign governments were valid. *Id.* at 196. The City relied on the FSIA's "immovable property" exception, which applies when "rights in immovable property situated in the United States are in issue," 28 U.S.C. §1605(a)(4). In applying that exception, this Court did not cite *Bell* or consider its relevance, and the parties do not appear to have suggested that *Bell* might apply. No. 06-134 Pet. Br., 2007 WL 608160; No. 06-134 Resp. Br., 2007 WL 1033565; *cf. Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) (where Court "never squarely addressed the issue," but "at most assumed the applicability" of a particular standard, Court is "free to address the issue on the merits").

The D.C. Circuit also would not have applied *Bell* in *Permanent Mission*. The jurisdictional inquiry there (whether the suit implicated rights in immovable property) did not overlap with the merits (the validity of the tax liens). Whether the buildings were subject to City tax turned on the law of consular relations, not on whether the tax liens constituted "rights in immovable property." *City of New York* v. *Permanent Mission of India to the United Nations*, 618 F.3d 172, 177-178 (2d Cir. 2010). Under *Simon*, 812 F.3d at 140-141, the D.C. Circuit would have decided the jurisdictional issue without applying *Bell*.

In cases like this one, unlike *Permanent Mission*, applying *Bell* preserves the distinction between jurisdictional and merits questions. The government's approach would collapse that distinction and "carr[y] the courts beyond the bounds of authorized judicial action." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Under the government's view, a court would have to make a final determination at the threshold of

an expropriation case whether the defendant had provided "just compensation"—that is, the "prompt[,] adequate[,] and effective compensation required by international law." *Restatement (Third) of Foreign Relations Law* §712 cmt. c (1987). If the court found the compensation was "just," it would have to conclude that there had been no violation of international law and that it had no jurisdiction in the case—but not before interpreting and applying the requirements of "prompt," "adequate," and "effective" compensation, effectively making binding pronouncements of law in circumstances where it had no authority to do so, *Steel Co.*, 523 U.S. at 93-102.

The government attempts to justify this approach (at 12-13) on the tenuous ground that the FSIA contains "substantive federal immunity standards" that are absent in the federal-question jurisdiction statute. But as the D.C. Circuit has explained, the "substantive federal immunity standards" in the expropriation exception require only (1) that certain factual predicates establishing a jurisdictional nexus to the United States are present, and (2) that the plaintiff has "put 'in issue' ... a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property ... in violation of international law." *Agudas*, 528 F.3d at 940; *see Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006) (substantive "jurisdiction-conferring provisions" often "describe particular types of claims" over which a court may exercise jurisdiction); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496-497 (1983) (FSIA's exceptions generally identify the "*types of actions* for which foreign sovereigns may be held liable" (emphasis added)). That the FSIA requires a suit to implicate a certain type of claim before a court may assume jurisdiction does not support the government's

view that a court must resolve that claim on the merits to determine its own jurisdiction.

II. THE GOVERNMENT IS CORRECT THAT THE OTHER QUESTIONS PRESENTED DO NOT WARRANT REVIEW

The government is correct (at 6) that this Court should deny review of the principal questions presented. As the government explains, certiorari is not warranted on either issue, regardless whether the Court decides to review the *Bell* issue. U.S. Br. 6-7, 20-21, 23.

A. H&P-V's Claim Does Not Merit Review

Until this case, only the Second Circuit had considered the rare circumstance in which a foreign state expropriates a domestically incorporated corporation based on discriminatory animus due to the corporation's American shareholders. That court twice concluded that Cuba's expropriation of a U.S.-owned company incorporated in Cuba violated international law. *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967). Like this case, Cuba treated the domestic corporation "in a particular way because of the nationality of its shareholders" and could not rely on "the 'nationality' of the corporate fiction" to evade the international-law prohibition against discriminatory and uncompensated takings. *Sabbatino*, 307 F.2d at 861; *Farr*, 383 F.2d at 185. As the government agrees (at 20, 21), the D.C. Circuit's decision following *Sabbatino* and *Farr* "d[oes] not create any ... split" and "lacks significance beyond this case." *See* Opp. 11-18.

The D.C. Circuit's decision is consistent with international law as reflected in the Second and Third Restatements. Both acknowledge—as does the govern-

ment (at 9 n.3)—that discriminatory takings violate international law, and both cite *Sabbatino* and *Farr* as paradigmatic examples. *See Restatement (Second) of Foreign Relations Law*, §171 cmt. d, illus. 3 (1965); *Restatement (Third) of Foreign Relations Law* §712 reporter's note 5; Opp. 13-14.

The decision also aligns with *Barcelona Traction, Light & Power (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5). Contrary to the government's characterization (at 19), *Barcelona Traction* does not hold that a corporation must "be treated as a national of its state of incorporation" for all purposes, even where—as here—that state has deemed the corporation "foreign" for "all relevant legal effects" and targeted it for expropriation based on the foreign nationality of its shareholders. Opp. 2, 4-6, 30-31.[2] The ICJ held only that the state of a corporation's shareholders does not have a superior right to assert diplomatic protection on behalf of a corporation when the corporation's state of incorporation has already asserted diplomatic protection based on "a close and permanent connection." 1970 I.C.J. at 42 ¶71; *see* Opp. 15-16. The ICJ left open the possibility that diplomatic protection by another state with significant links—including the state of a parent corporation or its shareholders—could be appropriate in an action against the state of incorporation. 1970 I.C.J. at 48 ¶¶92-93; *see also Restatement (Third)of Foreign Relations Law* §213 reporters' note 3.

---

[2] Venezuela's treatment of H&P-V as a "FOREIGN COMPANY" provides an alternative ground for the decision below that the court of appeals did not address. Opp. 30-31. This independent ground—and the other jurisdictional defenses that remain unresolved (Opp. 29-30)—render this case a poor vehicle even if the issues warranted review.

B. H&P-IDC's Claim Does Not Warrant Review

As the government agrees (at 22-23), municipal law often "accords shareholders 'direct rights' related to [a] corporation that are independent of the rights of the corporation" itself, and the taking of the corporation's property can "implicate [the] shareholder's direct rights." U.S. Br. 22-23; *see Barcelona Traction*, 1970 I.C.J. at 34, 36 ¶¶41, 47 ("[m]unicipal law determines the legal situation ... of those persons who hold shares in [corporate entities]," and "[w]henever one of his direct rights is infringed, the shareholder has an independent right of action").

Here, both U.S. and Venezuelan law conferred relevant direct rights on H&P-IDC. *See* Opp. 19; *Fletcher Cyclopedia of the Law of Corporations* §§2949.21, 2949.40 (2013 rev. ed.); Vz. Commercial Code, art. 280(4) (Opp. App. 1a-2a). The D.C. Circuit accordingly held that as the sole shareholder of a business that was taken in its entirety, H&P-IDC placed its direct "rights in property ... in issue" in this case. Pet. App. 17a-22a.

The government quibbles (at 22-23) with the standard of review the court applied in making that determination, but it does not claim the court reached the wrong conclusion. That conclusion would be correct under any standard. Petitioners do not contend that the court of appeals' holding creates a circuit conflict, arises frequently, or holds any significance beyond this case. Opp. 18. As the government concludes (at 23), this question "does not warrant review."

CONCLUSION

The petition should be denied.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
BLAKE C. ROBERTS
MOLLY M. JENNINGS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
david.ogden@wilmerhale.com

JUNE 2016